

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Improving Competitive Broadband Access to)	GN Docket No. 17-142
Multiple Tenant Environments)	
)	

COMMENTS OF NETMOBY, INC.

NetMoby, Inc. (“NetMoby”), respectfully submits these Comments in reply to the Notice of Inquiry released on June 21, 2017 by the Federal Communications Commission (“Commission” or “FCC”) in the above-referenced proceeding seeking comment on ways to facilitate greater consumer choice and enhance broadband deployment in multiple tenant environments (“MTEs”).

I. Introduction

NetMoby is a Service-Disabled Veteran-Owned Small business (SDVOSB) incorporated under the laws of the District of Columbia, Washington, D.C. NetMoby is an emerging technology company with decades of collective experience in a myriad of technical areas most notably in all areas of wireless telecommunications. NetMoby is currently developing wireless broadband systems across the country to provide Wireless Broadband Internet Access Service (“WBIAS”) service to MTEs; hence its interest in submitting comments in this proceeding.

NetMoby agrees with the FCC: “High-speed Internet access is an increasingly important gateway to jobs, health care, education, and information, allowing innovators and entrepreneurs to create businesses and revolutionize entire industries.”¹

¹ In fact, the Internet expands opportunities for commerce and strengthens our economy. A broad agenda to promote broadband access will empower Americans living in every community—from urban city

It is admirable that the FCC continues to explore ways in which it can accelerate the deployment of next-generation networks and services and better enable innovation and competition in the market for high-speed Internet access. NetMoby supports this effort, with the following specific comments to ensure the clearest path to enable competition in the MTE marketplace.

II. True Competition In the Communications Marketplace Is a Time-Honored FCC Principle

The concept articulated of the “invisible hand” of Adam Smith in his *Wealth of Nations* is interpreted to posit that the idea of trade and market exchange in a free market ultimately channels self-interest toward socially desirable ends, thus validating the principle of true competition in the economic marketplace. The National Broadband Plan states that “Competition is crucial for promoting consumer welfare and spurring innovation and investment in broadband access networks. Competition provides consumers the benefits of choice, better service and lower prices.” The FCC recognizes this concept in almost every aspect of its rulemaking regime, particularly with respect to MTE’s as described in the Notice of Inquiry.

As the FCC noted, in its *2000 Competitive Networks Order*, that *Order* implemented several measures to ensure that competing telecommunications providers could provide services to customers in MTEs. More specifically, the order: (1) prohibited common carriers from entering into contracts that restrict or effectively restrict owners and managers of commercial MTEs from permitting access to competing common carriers in order to serve tenants; (2) clarified the Commission’s rules governing control of in-building wiring and facilitated the

centers to rural towns—with economic opportunities that will jumpstart growth in jobs and wages. In fact, for every \$5 billion invested in broadband infrastructure, 250,000 jobs are created and with every percentage point increase in new broadband distribution, employment expands by 300,000. *See* Letter to President Donald J. Trump from U.S. Senate (Jan. 31, 2017), *available at* <https://prodnet.www.neca.org/publicationsdocs/wwpdf/2217congress.pdf>.

exercise of building owner options regarding that wiring; and (3) concluded that the access mandated by Section 224 of the Communications Act of 1934, as amended (the Act) includes access to conduits or rights-of-way that are owned or controlled by a utility within MTEs.

III. Evidence Is Clear That FCC Action Will Be Warranted As There Is Insufficient Competition In The MTE Marketplace

The evidence in this proceeding supports the conclusion that significant FCC action is needed to eliminate barriers to entry² and ensure competition in the MTE marketplace.

A. Numerous Comments Already Submitted In This Proceeding Support The Need For Regulatory Measures To Increase Competition

1. INCOMPAS Ex Parte Letter

The FCC points out in the Notice of Inquiry that some parties “argue that further Commission action addressing restrictive arrangements between broadband providers and MTEs is necessary to foster additional competition. One of those parties is INCOMPAS.³ The INCOMPAS *Ex Parte Letter* states in pertinent part that:

Competitive providers of fixed and mobile broadband services also continue to face challenges in expanding their service footprint and gaining access to many customers residing in multiple dwelling units (“MDUs”) who want

² Section 257 of the Communications Act of 1934 (the Act), which was adopted as part of the Telecommunications Act of 1996, requires the Commission to conduct a proceeding examining the market entry barriers for entrepreneurs and other small businesses in the communications industry. The Commission completed that proceeding in May 1997. The law also instructs the FCC to report to Congress every three years on the actions the FCC has been taking to eliminate barriers for entrepreneurs and small businesses and to propose legislative changes that would further this goal. Section 257 instructs the Commission to undertake this work in a manner that promotes the policies and purposes of the Act favoring: 1) diversity of media voices, 2) vigorous economic competition, 3) technological advancement, and 4) promotion of the public convenience and necessity.

³ See Letter from Angie Kronenberg, Chief Advocate & General Counsel, INCOMPAS, to Marlene H. Dortch, Secretary, FCC at 4 (Feb. 13, 2017), <https://ecfsapi.fcc.gov/file/10213980822348/Ex%20Parte%20Letter%20for%20Chairman%20Pai%20Meeting%20on%20Feb.%209%2C%202017--Broadband%20Deployment%20Agenda.pdf> (INCOMPAS Feb. 13, 2017 *Ex Parte Letter*).

their service. Incumbents have used a number of contractual methods to stymie deployment of BIAS and competitive video services to MDUs. For instance, incumbent providers and property owners have used marketing arrangements, (footnote omitted) with exclusive rights to advertise their services in building common areas, on MDU websites, and in new resident materials, and other contractual mechanisms to effectively deny (or create a perverse incentive to deny) competitive access. Additionally, property owners have demanded revenue sharing arrangements with competitive providers. (Footnote omitted.) Competitive broadband and video providers that are unable or unwilling to participate in this kickback scheme are denied access to MDUs.

Moreover, wiring exclusivity arrangements have allowed incumbent MVPDs to prevent utilization of existing inside wiring even after a customer has ceased service. As you are aware, the incumbent provider is required by law to either make the wiring available to another MVPD or remove it. (Footnote omitted.) However, incumbents enter into agreements with MDUs to lease this fallow wiring on an exclusive basis, forcing competitive providers into the difficult position of having to choose between installing duplicative in-unit wiring or not serving the building at all. As explained recently by ITTA, this access “is required by law to ensure that consumers in apartment buildings and similar places can obtain video service from a competing provider.”(Footnote omitted.) This exclusive leasing practice is now defeating that intent and deterring competitive providers from serving those MDUs....

The net impact of these practices is that deployment of competitive broadband and video services are discouraged, and in some instances, denied altogether. When deploying competitive networks, it is critical that competitive providers can reach as many potential customers as possible with their networks. When access to customers residing in MDUs is thwarted, the business case to build a competitive network is significantly impacted, further jeopardizing the competitive provider’s ability to offer its services to a community.

Id., at 4.

Importantly, the INCOMPAS *Ex Parte Letter* also points out that there is evidence that when a third competitive broadband provider enters the market to offer residential (wireline) BIAS, prices drop and the telco and cable incumbents respond by increasing

speeds, upgrading their infrastructure, and lowering prices.⁴

2. Fiber to the Home Council White Paper

INCOMPAS cites another concerned party in its *Ex Parte Letter*. In a November 2016 White Paper, the Fiber to the Home Council (“FTTH”) pointed out that:

Fast, affordable broadband access and other communications services are increasingly essential to Americans and their communities. But whether or not you have a choice of communications providers often depends on where you live. For the approximately thirty percent of American families that reside in multi-dwelling unit buildings or communities (MDUs),¹ their communications service access is largely determined by the building owner/manager.² In many instances, the building owner/manager understands the value their residents place on having a choice of communications providers offering high-performance services and permits multiple providers to enter and offer service.³ However, far too often, the building owner/manager prevents competing providers from entering and offering service or otherwise limits residents’ choices. For virtually all residents in these underserved locations, moving to another MDU where there is a choice of providers is not a practical alternative.⁵

In addition, FTTH points out that enabling choice will especially benefit minorities, low-income individuals, and seniors who reside in MTEs. FTH states that:

According to the FCC, “[t]he percentage of minorities living in MDUs is larger than that of the general population.” (Footnote omitted.) The same is true for senior and low-income Americans in

⁴ See INCOMPAS Biennial Review Reply Comments, WC Docket No. 16-132 et al., at 9 (*citing* Google Gets Beaten to the Punch by AT&T on Super-Fast Broadband, Bloomberg Technology, April 25, 2016 *available at* <https://www.bloomberg.com/news/articles/2016-04-25/google-gets-beaten-to-the-punch-by-at-t-on-super-fast-broadband> (“Markets that Google enters enjoy a \$20-a-month drop in prices on average.”) Google’s fiber effect: Fuel for a broadband explosion, CNET, April 30, 2014 *available at* <https://www.cnet.com/news/googles-fiber-effect-fuel-for-a-broadband-explosion/>). But NOTE that the National Broadband Plan indicates that only 4% of housing units in the United States have access to approximately 4% of housing units that are in areas with three wireline providers (either DSL or fiber, the cable incumbent and a cable over-builder), 78% lives in areas with two wireline providers, about 13% are in areas with a single wireline provider and 5% have no wireline provider. All the more reason for increased competition, particularly by wireless Internet Service Providers. See National Broadband Plan at <http://www.broadband.gov/plan/4-broadband-competition-and-innovation-policy/#s4-1>.

⁵ “Residents’ Choice: Ensuring Consumers in Multiple-Dwelling Units Can Choose Their Communications Provider”, *FTTH Council White Paper*, November 2016. Page 1.

major metropolitan areas, according to statistical studies by the United States Telecom Association. As a result, giving MDU residents choice of a service provider will especially benefit those underserved communities. It also will benefit video programmers specializing in programming oriented to those groups. (Footnote omitted.)

Id., at p. 3.

3. Comments of FastMesh LLC

FastMesh is a small ISP operating for eight years in the Portland and Seattle area market.

In its comments submitted on June 16, 2017, FastMesh states:

Over the course of 8 years, we have been welcomed into over 70 MDU/MTE properties within the Portland and Seattle area. From our inception, we challenged ourselves to build a network that can provide affordable internet to all locations we service. Our plans range from \$15-\$35 a month. I would like to list some of the challenges we face, and then make a single request of the FCC for consideration.

Challenges:

- We are told routinely that we cannot bring services into an MDU as they have an ‘exclusive agreement with the cable company’. Regardless of our attempt to share with them the non-enforceability of those predatory agreements, we struggle to gain access if at all to entire groups of properties when this statement is made.
- Inability to give users service when they are moving from one MDU to another MDU, as the new management are not willing to allow us to bring services in. We routinely have users who struggle to find new housing that can maintain affordable internet options.
- When we get service request to provide service to a resident in a new MDU, we are given the run around or the approval process can be unnecessarily long (3-6 months), which is hurting our ability to grow, and hurts the consumers ability to choose. These delays force them to sign up with the main 2 providers in the area and the new potential customers can not benefit from our low cost high speed connectivity.
- We routinely are asked “what’s in it for me” where building managers want a kickback from revenues earned. This may be the status quo for some cable companies, but this limits low cost ISPs like us to be able to provide services at low prices, and limits our entry into many MDUs.

The FastMesh Comments conclude with this observation:

I strongly feel that these challenges have limited our ability to provide service to more areas. I have a short list of over 50 properties that have denied us entry. I feel that over the last 8 years, if we had better regulation, some kind of enforcement of them, and clear communication of them to MDU owners, we would be in an additional 100 properties, have a more robust network, and have a larger team of employees to develop our network and technology.

4. Comments of Horry Telephone Cooperative

In its comments submitted in this proceeding as an *ex parte* filing on June 13, 2017, Horry Telephone Cooperative (“HTC”) states that, during a meeting with FCC Commissioner Michael O’Rielly and Robin Colwell, Chief of Staff and Senior Legal Advisor to Commissioner O’Rielly, HTC personnel noted that

originally, bulk-billing arrangements were utilized only for hotels and apartment buildings. Now, however, HTC has seen in Horry County, SC that its main competitor is using long term contracts with below market pricing combined with bulk-billing arrangements for single family communities as a means to stifle competition and to thwart the deployment of advanced broadband.⁶

All of the foregoing demonstrates that the Commission must determine there is a substantial need and must implement and enforce rules that prohibit anti-competitive behavior which deters the provisioning of broadband Internet service by competitive providers to MTEs as soon as possible after the conclusion of this Inquiry.

IV. Specific Measures FCC Needs To Implement In Order To Ensure Robust Competition In Provision Of High-Speed Internet Access.

The Commission notes in its Notice of Inquiry that

The Commission previously has prohibited providers from entering into or enforcing exclusive agreements to provide services to customers in

⁶ See Horry Telephone Cooperative, *Notice of Ex Parte: Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, GN Docket No. 17-142, June 13, 2017.

commercial and residential MTEs. (Footnote omitted.) In this Notice, we seek comment on the state of broadband competition in MTEs and whether additional Commission action in this area is warranted to eliminate or reduce barriers faced by broadband providers that seek to serve MTE occupants.

NetMoby urges that the Commission must take additional action to eliminate current barriers to entry to the MTE marketplace. In particular, NetMoby's greatest concern is the area of agreements and other actions taken in concert between carriers and providers to prevent competitive carriers from providing wired and wireless services to customers in commercial and residential MTEs. The Commission must prevent any restrictive action between an entity that provides any element needed to allow a competitive provider to offer broadband Internet service and the entity which owns or controls the subject MTE.

A. NetMoby Urges The Adoption Of The Following Specific Measures At The Conclusion Of This Inquiry

In the section of the Notice of Inquiry addressing its statutory authority, the Commission reviews pertinent statutory authority and case precedent and concludes that "Thus, the Commission's existing rules prohibit both the execution and enforcement of any contractual provisions granting cable operators and common carriers exclusive access to MTEs. "

The FCC previously declined to prohibit MVPDs from using bulk billing arrangements, concluding that such arrangements predominantly benefit consumers through reduced rates and operational efficiencies and by enhancing deployment of broadband. The Commission also declined to prohibit MVPDs from using exclusive marketing arrangements, finding that it could not, based on the record, conclude that such arrangements significantly hinder or prevent other MVPDs from providing service to MDU residents.

The Commission must exercise its statutory authority now.

In addition, the prohibitions articulated by the Commission seventeen years ago must not only be reiterated but also must be reinvigorated now. Specifically, the measures implemented in the FCC's *2000 Competitive Networks Order*, i.e., which (1) prohibited common carriers from entering into contracts that restrict or effectively restrict owners and managers of commercial MTEs from permitting access to competing common carriers in order to serve tenants; (2) clarified the Commission's rules governing control of in-building wiring and facilitated the exercise of building owner options regarding that wiring; and (3) concluded that the access mandated by Section 224 of the Communications Act of 1934, as amended includes access to conduits or rights-of-way that are owned or controlled by a utility within MTEs, must be enforced strongly by the FCC.

In addition, the FCC must prohibit MVPDs from using bulk billing arrangements, and also must prohibit MVPDs from using exclusive marketing arrangements. The FCC must also establish the broad principal that any measure that hinders or prevent other MVPDs or Internet broadband carriers of any type from providing service to MDU residents is prohibited by the Communications Act of 1934 as amended.

The Commission must also guarantee that wireless Internet Service Providers have open access to rooftops of MTE's for the installation of necessary receive and transmit antennas for the provision of broadband Internet service to an MTE.

B. Summary Of NetMoby's Proposed Specific Measures To Ensure Competition In The MTE Marketplace

In summary, the Commission, at the conclusion of this proceeding:

1. Must prohibit any party, regardless of regulatory classification or lack of same, from entering into contracts that restrict or effectively restrict owners and managers of commercial or

residential MTEs from permitting access to competing providers, including agreements directly with individual tenants or residents of an MTE.

2. Must allow complete access to an MTE's in-building wiring needed to provide competitive broadband Internet service, regardless of any agreement or arrangement between the MTE owner/manager restricting same;

3. Must allow complete access to an MTE's to all elements of the MTE electrical system owned or controlled by a utility, including but not limited to, electrical closets, conduits, risers, power sources, grounding facilities or rights-of-way that are owned or controlled by said utility within an MTE needed to provide competitive broadband Internet service;

4. Must allow complete access to an MTE's rooftop for the installation of necessary receive and transmit antennas for the provision of broadband Internet service to an MTE.⁷

5. In sum, must allow complete access to any and all elements of the MTE required by the competitive broadband Internet service provider to bring its service to customers in the MTE.

V. Anti-Competitive Pressures Are Only Going to Increase As More Service Providers Enter The Broadband Internet Marketplace

The Commission needs to take the actions proposed by NetMoby for the reasons previously described as well as for the following. The MTE marketplace is only going to get more crowded in the future, perhaps in the immediate future. For example, Multichannel News has recently reported that:

Following a set of market trials, machineQ, a unit of Comcast, focused on enterprise Internet of Things services, said it has entered the early stages of its commercial rollout by expanding its reach into a

⁷ FTH opines in its White Paper cited above that "The federal government recognizes, at least to some extent, that consumers should access to communications services, as it has given MDU residents the right install a satellite dish or wireless receiver. See <https://www.fcc.gov/media/over-air-reception-devices-rule>. It is no different to allow access to inside wiring, conduits and electrical closets to facilitate wireless service to residents in an MTE."

dozen more U.S. markets. machineQ, which uses Low Power Wide Area Network (LPWAN) technology based on the LoRaWAN protocol, is building and deploying in the following Comcast markets -- Atlanta, Baltimore, Boston, Denver, Detroit, Indianapolis, Miami, Minneapolis/St. Paul, Oakland, Pittsburgh, Seattle, and Washington D.C. Those rollouts follow trials in Philadelphia, the San Francisco Bay Area, and Chicago that got underway last fall.

See Multichannel News, *Comcast IoT Unit Heads Into a Dozen More Markets* (July 18, 2017), <http://www.multichannel.com/news/distribution/comcast-iot-unit-heads-dozen-more-markets/414027>

Consequently. Services such as machineQ will only serve to increase economic pressures on MTE owners to restrict access to competitive service providers.

VI. The FCC Must Commit To Strict Enforcement Of Violations Of Its Rules Concerning MTE

As set out in detail in its Notice of Inquiry, the FCC to date has issued decisions which are designed to foster competition in the MTE marketplace by ensuring that competing telecommunications providers could provide services to customers in MTEs. However, based on the record in this proceeding to date, the Commission has failed in its mission. It is clear that the dominant Internet Service Providers are exerting their monopolistic power at every opportunity to collude with MTE owners to prevent competitive Internet providers from access to MTEs.⁸

NetMoby also could find no enforcement action against a BIAS provider which had violated the Commission's rules concerning the restriction of broadband Internet service to an MTE. Admittedly, this may be the result of the failure of a competitive service provider to file a complaint with the FCC. However, at this point in time this dearth of FCC action must change.

⁸ One need only review the history of the rise and fall of Competitive Local Exchange Carriers (CLECs) in the wake of the Telecommunications Act of 1996 to understand that monopolists will take every measure permitted by law (or not permitted) to protect and preserve its monopoly. This philosophy is manifest in the record in this proceeding and must be vigorously rebuffed by the FCC.

NetMoby is aware that the responsibility for enforcement of the broadband rules is currently in a state of limbo as the FCC attempts to transition the classification of broadband Internet services from Title II status to designation as an “information service”.⁹ NetMoby is also aware that the reversal of the classification of BIAS from a common carrier service to an information service, would have the effect of returning BIAS providers to FTC jurisdiction.

Regardless of the result of that effort, the FCC must establish a page on its website to describe the rules for provision of broadband Internet Access to MTEs and the prohibitions to restricting that access. The Commission has established numerous such pages. For example, see

<https://www.fcc.gov/media/over-air-reception-devices-rule>.

Furthermore, the Enforcement Bureau of the FCC must add a section to its home page providing a primer as to the method for filing a complaint with the FCC (or the FTC if that agency ultimately will be responsible for enforcement.) The FCC should implement this measure immediately. As the Commission has noted in this Inquiry, as described *supra.*, there are already numerous orders and rules in place which should prevent the type of illegal behavior described in the comments already filed in this proceeding. INCOMPAS, Fiber to the Home Council, FastMesh and the Horry Telephone Cooperative have all detailed behavior that violates the Commission’s current rules. There is no need to wait; enforcement must begin immediately not only to stop this current behavior but also to deter future illegal behavior, as the broadband Internet marketplace becomes more crowded.

⁹ See Notice of Proposed Rulemaking in Restoring Internet Freedom, WC Docket No. 17-108, FCC 17-60 (proposed May 23, 2017), published in 82 Fed. Reg. 25568 (June 2, 2017) (to be codified in 47 C.F.R. pts. 8 & 20).

**VII. FCC Must Not Distinguish Between The Provision Of
Wireless Broadband Internet Service And Fixed Broadband Internet Service.**

It is critical that any provision ultimately adopted by the FCC with respect to the provision of broadband Internet service to MTEs make not distinguish between fixed service providers and wireless service providers. While most of the previous Commission orders and rules have been issued in the context of fixed broadband service, Wireless Broadband Internet Service providers such as NetMoby are going to constitute a large number of broadband Wireless Internet Service Providers (“WISPs”)¹⁰ in the future and would urge the Commission to take that into consideration as part of this Notice of Inquiry and the promulgation of any rules in the future.

VIII. Conclusion

Again, NetMoby applauds the FCC as it continues to explore ways in which it can accelerate the deployment of next-generation networks and services and better enable innovation and competition in the market for high-speed Internet access. NetMoby supports this effort, and urges the FCC to follow the direction of Adam Smith’s invisible hand to open the MTE marketplace to true competition for Fixed and Wireless Broadband Internet Access Service and to all the benefits that will ensue from same.

Dated: July 24, 2017

Respectfully submitted,

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¹⁰ There currently are more than 3,000 WISPs in the United States serving over 3,000,000 users. See <http://www.wispa.org>.

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